



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Spectrum Astro, Inc.

File: B-258111.2

Date: February 14, 1995

Robert E. Little, Jr., Esq., and Garry S. Grossman, Esq., Fenwick & West, for the protester.
Pierre L. Deponai, Esq., for Ball Corporation, an interested party.
Bruce Winchell, Esq., Sandia National Laboratories, Department of Energy, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest contention that agency awarded a legally insufficient contract lacking material terms is dismissed as untimely when the alleged insufficiency was clear from the face of the solicitation, and where the protester waited until award before raising the issue.
2. Agency is not required to perform a cost realism analysis where it awarded a fixed-price contract after full and open competition.

DECISION

Spectrum Astro, Inc. protests the award of a contract to Ball Corporation pursuant to request for quotations (RFQ) No. AH-9487, issued by Sandia Corporation, in its capacity as the management and operations (M&O) contractor at the Department of Energy's Sandia National Laboratories.¹

¹Sandia is subject to our bid protest jurisdiction as an M&O contractor that effectively awards subcontracts "by or for" the government. DOE's regulations provide for our Office to consider protests involving acquisitions by M&O contractors such as Sandia. Department of Energy Acquisition Regulation, 48 C.F.R. § 970.7107 (1994); AT&T, B-250516.3, Mar. 30, 1993, 93-1 CPD ¶ 276. We review subcontract awards by prime M&O contractors under a "federal norm" standard to determine whether the procurements and selection decisions are consistent with the policy objectives set forth in statutes and regulations which apply directly to federal

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Spectrum Astro challenges several facets of the awarded contract, and argues that Sandia failed to perform a required cost realism analysis and improperly held discussions with only one offeror in order to determine the not-to-exceed (NTE) price for the option effort.

We dismiss the protest in part and deny it in part.

BACKGROUND

The RFQ was issued for a Spacecraft Bus Subsystem for a Multispectral Thermal Imager Program.² The procurement was divided into three component parts: (1) contract A, a labor-hour contract for personnel to assist Sandia in the development and integration of the Spacecraft Bus Subassembly; (2) contract B, a fixed-rate task order contract for engineering, technical, and quality support; and (3) a fixed-price option under contract B (referred to as "contract C" by the agency and the protester) for fabrication of the Spacecraft Bus Subassembly. The RFQ advised that award would be made to the responsible offeror submitting "the most advantageous overall technical/cost package."

The RFQ package advised potential offerors of the technical and price/cost criteria that would be evaluated, as well as the total available points for each. The technical factor was worth 4,350 points; the price/cost factor was worth 1,900 points. Under the technical factor there were two scored subfactors, each with several elements (none of which is relevant here). These two technical subfactors were: (1) qualification and intent, 2,000 points; and (2) conceptual design, 2,350 points. Under the price/cost factor there were three scored subfactors: (1) labor contract costs, 250 points; (2) task contract costs, 250 points; and (3) firm fixed contract NTE costs, 1,400 points.

¹(...continued)

agency procurements. Elma Eng'g, 70 Comp. Gen. 81 (1990), 90-2 CPD ¶ 390.

²The Multispectral Thermal Imager Program is described by the agency as a demonstration experiment where Sandia will design, develop, and integrate a satellite for nonproliferation studies. The Spacecraft Bus Subsystem at issue here is one of three major subsystem procurements within this program. The other two subsystems are the Optical Subsystem and the Focal Plane subsystem. Each of the three subsystems will have multiple contracts. This protest involves the award of the first two of three contracts related to the Spacecraft Bus Subsystem.

After evaluating the five proposals received in response to the RFP, Sandia concluded that the technical proposals of Ball Corporation, the awardee, and Spectrum Astro, were the two best, and contained no weaknesses requiring discussions. After assigning scores to the price proposals and after combining the price and technical scores, Sandia decided that the proposal of Ball was most advantageous to the government. On July 1, Sandia awarded contracts A and B to Ball, and this protest followed.

UNTIMELY PROTEST ISSUES

Spectrum Astro's initial and supplemental protests are largely untimely because they raise issues that should have been clear from the face of the solicitation. Our Bid Protest Regulations specifically require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1) (1994); Englehard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324.

For example, in its initial protest, Spectrum Astro complains that the labor-hour portion of the contract is legally insufficient and alleges that the contract lacks a scope of work, a ceiling price, and virtually all material terms.³ In addition, Spectrum Astro claims that the contract provides no valid basis for determining probable cost to the government. While we disagree with Spectrum Astro--and in fact, fail to see how the contract here is different from any labor-hour contract--each of these contentions could and should have been raised prior to the closing time for receipt of initial proposals as each involves an alleged solicitation impropriety which was clear from the face of the RFP. 4 C.F.R. § 21.2(a)(1). We will not permit a protester to compete for such a contract, and then challenge the legal sufficiency of the awarded contract when another offeror prevails in the competition.⁴

³While challenges to the legal sufficiency of a solicitation are not often raised in this forum, we have and will consider a protester's timely claim--i.e., one filed prior to the bid or proposal due date--that a solicitation anticipates award of a contractual instrument that is legally insufficient in some way. See Southwest Lab. of Oklahoma, Inc., B-251778, May 5, 1993, 93-1 CPD ¶ 368.

⁴Likewise, the protester's supplemental protest filed after receipt of the agency report--and after a conference call with all parties to discuss our forum's timeliness requirements--raises issues that were clear from the face of
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THE NOT-TO-EXCEED PRICE FOR THE OPTION EFFORT

Spectrum Astro's protest raises several challenges to Sandia's evaluation of the NTE price required in the solicitation for the option effort. Specifically, Spectrum Astro argues that: (1) the not-to-exceed price is not a ceiling price, as claimed by the agency, but is instead a baseline cost estimate, and thus Sandia was required to perform a cost realism analysis of this portion of the offerors' proposals; and (2) Sandia held discussions with only the awardee regarding the NTE price for the option effort. For the reasons below, we deny this portion of the protest.

As a preliminary matter, we note that Spectrum Astro's challenge to the evaluation of the option price here is grounded in its confusion about the terms of this RFQ. This confusion arises, in part, from Sandia's use of a package of multiple solicitation documents--including a separate RFQ package. For ease of reference, the provisions at issue are set forth below.

In the portion of the RFQ package related to contract A--the labor-hour portion--offerors are advised at section 1, page 3, clause 6, that contracts A and B will be awarded concurrently. This clause also refers offerors to the portion of the RFQ package related to contract B--the task order portion--for a discussion of contract B pricing. The contract B portion of the RFQ package advises offerors that Sandia may require the delivery of an option item alternately described as contract C, or the Spacecraft Bus Plane Assembly Procurement. RFQ contract B, section I, page 4, clause 6.⁵ This clause explains that the option

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the solicitation. Specifically, Spectrum Astro alleges that the labor-hour contract is an impermissible cost-plus-percentage-of-cost contract, and, to buttress its contention, Spectrum Astro quotes extensively from the solicitation. Again, while it appears that there is little difference between this and any other labor-hour contract, Spectrum Astro's own protest documents highlight the fact that this issue could have been raised prior to submission of its initial proposal. Thus, this contention is untimely at this late juncture. Id.

⁵Each of the portions of the RFQ package renumbers its sections, pages, and clauses; thus, identical cites to section, page and clause numbers can refer to different efforts--i.e., the effort associated with contract A, contract B, or the option effort.

will have a fixed price that will be determined at a later date. Specifically, the clause states:

"Pricing for the option is as follows:

. . . . This contract is a fixed price contract for fabrication and testing of the hardware. The Contractor shall quote a not to exceed price for the fabrication and testing of the hardware. This price represents the maximum price that may be charged for the fabrication of the hardware. Final determination of the price of this option is subject to audit and negotiation.

The not-to-exceed price is ____*____.

*To be inserted at time of contract."

The RFQ package also includes a draft contract for the option effort. This portion of the RFQ does not repeat the pricing information quoted above, but states on its cover sheet that "[t]his is a contract on a firm fixed price basis between Sandia and the contractor noted below."

In addition to the RFQ package, Spectrum Astro points to the instructions for preparing technical and cost proposals that were provided as a separate document.⁶ With respect to the option price, these instructions state:

"Offerors shall provide Not To Exceed (NTE) cost estimates for delivering the spacecraft bus subassembly and shipping and handling equipment, as described by the [statement of work]. The estimate shall be based on the [technical requirements document] and on the offeror's conceptual design as presented in the technical proposal. [Sandia] will use this estimate as a baseline for analyzing and negotiating the firm fixed price that will be quoted by the contractor 5 months into Phase I Labor and Task Contracts, based on firm spacecraft bus requirements developed during Phase I Labor and Task Contracts. Final determination of the price of this option is subject to audit and negotiation."

Thus, while these instructions describe the price for the option effort as an NTE estimate, they also state that this

⁶This document is entitled, "Proposal Content and Evaluation Criteria Purchase Requisition AH-9487 Spacecraft Bus Subassembly, February 25, 1994." The guidance associated with the option effort is found at page 18.

estimate will provide a baseline for negotiating the fixed price to be quoted after performance on the labor and task contracts is underway. According to the protester, these instructions mean that the NTE price is not a ceiling, but a starting point for negotiating a price, and that the agency was required to perform a cost realism review of the estimates quoted for performing the option effort. In addition, Spectrum Astro argues that Sandia must have held improper discussions with Ball before entering the awardee's NTE price in the blank space provided in the option price paragraph quoted above. According to Spectrum Astro, this price could not be properly determined until the award of the option, not at the time of awarding the A and B contracts.

We disagree with each of these contentions. In our view, the protester's argument overlooks the language of the provision--as well as the fact that the fabrication effort is an option under the B contract--and does not support its claim that the agency was required to perform a cost realism review of the prices offered for the option effort.

First, the evaluation materials provided in the solicitation package clearly advised that the option price would be considered, along with the prices quoted for contracts A and B, to determine which offeror's proposal would be the most advantageous. To implement this intended approach, the option pricing provision within the contract B portion of the RFQ, on its face, requires the offeror to quote an NTE price which will be the maximum price that can be charged for the option effort. Thus, when the option provision states that the NTE price will be entered at the time of contract award, the only contracts to be awarded here are contracts A and B. The so-called contract C effort, if awarded at all, supplements contract B as an option regardless of how it has been described by the agency or by Spectrum Astro.⁷ To the extent that Spectrum Astro argues

⁷To the extent that Spectrum Astro misunderstood how this provision would operate when preparing its proposal--and a review of its proposal suggests there was no such misunderstanding--we fail to see how it was harmed as a result. Sandia awarded the full amount of the 1,400 available points to the offeror with the lowest NTE price (incidentally, neither Spectrum Astro nor Ball proposed the lowest NTE price for this effort), and awarded proportionally fewer points to the offerors with higher prices. If, as it argues, Spectrum Astro believed that this price was a baseline, and not an NTE price, then one can safely presume that Spectrum Astro offered a lower price than it would have offered if it were proposing a ceiling


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that the addition of Ball's NTE price in this blank is evidence of improper discussions between Sandia and Ball, its claim is not supported by the terms of the solicitation, or by the record, wherein Sandia states unequivocally that no discussions were held between it and Ball.

With respect to Spectrum Astro's core complaint that the agency failed to perform a cost realism review of the option prices, we conclude that no such review was required. A cost realism review, which measures the likely cost of performance, is mandatory for the award of cost reimbursement contracts because the government will generally bear the actual costs of performance. J&J Maintenance, Inc., B-244366.2, Mar. 7, 1994, 94-1 CPD ¶ 177. A cost realism review is typically not required in the evaluation of proposals when a fixed-price contract is contemplated because the government's liability is fixed and the contractor bears the risk of any cost escalation. Oshkosh Truck Corp., B-252708.2, Aug. 24, 1993, 93-2 CPD ¶ 115.

Here, the NTE price proposed at the time of the award of contracts A and B operates as a fixed-price instrument rather than a cost reimbursement instrument: the ceiling sets a maximum price subject only to downward revision at the time the option is exercised. As stated in the evaluation materials, this price was used--after full and open competition--to help determine which proposal was most advantageous to the government. In addition, any downward revision will be implemented with a fixed price for the option effort. Since the method of contracting anticipated does not require the government to reimburse Ball for its costs related to the option effort, and conversely, since the contractor, not the government, bears the risk of any cost escalation, Sandia was not required to perform a cost realism analysis. See Motorola Inc., B-236294, Nov. 21, 1989, 89-2 CPD ¶ 484.

The protest is dismissed in part and denied in part.


for Robert P. Murphy
General Counsel

⁷(...continued)

price--and as a result, received more points than it deserved. Since even with its lower price it was not the most advantageous offeror, Spectrum Astro appears to have been aided by its claimed misunderstanding, not harmed.